LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. FEINBLATT,
Proctors for Petitioner.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Summary of Argument	8
Argument:	
A. The Standard Towing Conditions are invalid as an attempt by a tower of an unmanned vessel to stipulate against liability for his own negligence	9
B. The Contract Containing the Standard Towing Conditions, Whether or not Valid as Between the Parties, is not Effective to Alter Liabilities of the Owners of Either the Tug or the Tow to Third Parties	14
1. *The Contract as Making the Tugmaster Petitioner's Agent as to Third Parties*	14
2. *Direct Enforcement of the Contract Against Petitioner as Indemnitor*	23
Conclusion	27

Table of Authorities

Cases

Adams v. The Peter Moran, 94 F. Supp. 520	3
Alaska Commercial Co. v. Williams, 128 F. 362 (CA 9, 1904)	11

PAGE

Bisso No. 9, The — William A. Bisso, Jr., Receiver, et al. v. Inland Waterways Corporation, 114 F. Supp. 713, 1953 A.M.C. 1661, 211 F. 2d 401, 1954 A.M.C. 648, No. 50, October Term, Supreme Court of U. S. 9, 14

Central States Grain Co-op. v. Nashville W. & E. Corp., 48 F. 2d 138, (CA 7, 1931) 27

Commercial Insurance Co. v. Ives, 46 Ill. 402 23

Compania de Navegacion v. Firemen's Fund Insurance Co., 277 U.S. 66 (The Wash Gray) 11, 13

Eugene F. Moran, The, 212 U.S. 466 9

German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 26

Great Lakes Towing Company v. American Steamship Company, 165 F. 2d 368 (CA 6, 1948) cert. den. 333 U.S. 881 13

Great Lakes Towing Company v. Bethlehem Transportation Company, 65 F. 2d 543 (CA 6, 1933) 13

Gubelman, In re, 13 F. 2d 730, (CA 2, 1926) 26

Hall-Scott Motor Car Company v. Universal Insurance Company, 122 F. 2d 531 (CA 9, 1941) cert. den. 314 U.S. 690 13

Helen, The, 5 F. 2d 54, (CA 2) 21

Isbrandtsen Company v. Local 1291 of International Longshoreman's Association, 204 F. 2d 495 (CA 3, 1953) 26, 27

Jonty Jenks, The, 54 F. 1021 (N.D. N.Y. 1893) 11

Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals, 251 U.S. 48 9

Logue Stevedoring Co. v. Dalzellance, etc., 98 F. Supp. 276 (D.C. S.D. N.Y., 1951) 25

Logue Stevedoring Company v. Dalzellance, etc., 198 F. 2d 369 (CA 2, 1952) 19, 21

Margaret, The, 94 U.S. 494 (1876) 14

Moran, In re, 120 F. 556 (E.D. N.Y., 1903) 11

PAGE

Moran Towing and Transportation Company v. Navigazione Libera Triestine, S. A., 92 F. 2d 37, (CA 2, 1937) cert. den. 302 U.S. 744 ..... 7, 19, 24

Mylroie v. B. C. Mills Tug and Barge Company, 268 F. 449 (CA 9, 1920) 11

Oceanica, The, 170 F. 893, (CA 2, 1909) 11

Patterson Oil, Inc. v. Tug Port Covington, 109 F. Supp. 953 (E.D. Pa., 1953), aff'd. 205 F. 2d 694 (CA 3, 1953) 20, 21

Petterson Lighterage Co. v. Tug J. R. Russel, 87 F. Supp. 467 (S.D. N.Y., 1949) 13

Publicker Industries, Inc. v. Tugboat Neptune Co. & Tugboat Triton Co., 165 F. 2d 1002 (CA 3, 1948) 19

Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company (William J. Worth), 171 F. 2d 48 (CA 3, 1949) 19, 20, 21, 22

Robins Drydock and Repair Company v. Flint, 275 U.S. 303 (1927) 25, 26, 27

Robins Drydock & Repair Co. v. Navigazione Libera Triestina, S.A. and Moran Towing & Transportation Company, Inc. (Brenta II) 154 N.Y. Misc. 788 (1931) aff'd. 261 N.Y. 455 (1933), cert. den. 290 U.S. 656 ..... 10, 16-19, 21, 22

Sea Lion, The, 12 F. 2d 124, 1926 A.M.C. 265 11

Somers N. Smith, The, 120 F. 569 (D.C. Me., 1903) 11

Stevens v. The White City, 285 U.S. 195 (1932) 14

Sturgis v. Boyer, 24 How. (65 U.S.) 110 ..... 8, 9, 14, 15, 16, 18, 19, 21, 22

Sun Oil Co. v. Dalzell Towing Co., 55 F. 2d 63, (CA 2, 1932) 12

Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 (1932) 7, 12, 13, 14, 15, 16

Syracuse, The, 12 Wall. (79 U.S.) 167 (1870) 10, 13, 14

Texas Company v. Lea River Lines, Inc., 109 F. Supp. 266, 267 (D.C. Del., 1953) reversed (206 F. 2d 55, (CA 3, 1953) 14

PAGE

Webb, The, 14 Wall. (81 U.S.) 406 (1871) 14

Winters, Martin, etc. v. Tug H. C. Jefferson, 69 F. Supp. 650 (E.D. Pa. 1946) 19

Miscellaneous

28 Cornell L.Q. 194 (1943) 13

Griffin on Collision 11, 16

Restatement of Contracts, pp. 133-147 26

Robinson, Handbook of Admiralty Law (1939) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court on liability[1] was rendered on June 10, 1947 and is reported in 72 F. Supp. 50, 1947 A.M.C. 819. The district court's opinion on damages[2] was rendered on March 22, 1949 and is reported in 85 F. Supp.

[1] Record, page 1.
[2] Record, page 42.

806, 1949 A.M.C. 1149. The opinion of the court of appeals[1] was rendered on January 4, 1954 and is reported in 209 F. 2d 410, 1954 A.M.C. 183.

JURISDICTION

Jurisdiction of this court was invoked by petition for writ of certiorari filed May 10, 1954, under 28 U.S.C. 1254. Certiorari was granted on October 14, 1954, ... U.S. ..., 99 L. ed. (Advance p. 25).

QUESTION PRESENTED

When an inert tow, wholly under the direction and control of a towing vessel, is brought into collision with a third vessel and sunk through negligence of the master of the tug, may the owner of the tow be held directly liable *in personam* to the owner of the third vessel for damage to the third vessel, solely by reason of a contract between the owners of the tug and tow, (to which the owner of the third vessel was a stranger) providing that all towing is done at the sole risk of the tow, that the owner of the tow will indemnify the owner of the tug for damages to third vessels and containing a provision declaring the master of the tug to be the agent and servant of the owner of the tow?

STATEMENT OF THE CASE

This is a suit in admiralty instituted by petitioner against the steam collier WINDING GULF, *in rem*, and her owners, *in personam*, to recover for loss of petitioner's vessel, Destroyer I-24, (otherwise known as the ST. FRANCIS), which was sunk as a result of a collision with the WINDING GULF, occurring while the I-24 was an inert tow, unmanned and without motive power, wholly under the direction and control of the tug PETER MORAN. Since jurisdiction could

[1] Record, page 57.

not be obtained over the tug or its owners in the District of Maryland, the tug was not before the court.[4] The WINDING GULF was damaged in the collision, and her owners filed a cross-libel *in personam* against petitioner.

The I-24 was one of two obsolete Canadian destroyers, purchased by petitioner to be converted to scrap. They were to be towed as "dead" ships, i.e. without motive power and with rudders secured amidships, from Sydney, Nova Scotia to Baltimore by Foundation Maritime Ltd., a large Canadian Towing Company. By letter dated at Halifax, N.S., July 3d, 1945, Foundation Maritime Ltd. advised petitioner:

> "We confirm our telegram to you of yesterday and your reply wherein it is agreed that we will supply tug for the towage of two former Canadian Navy Destroyers ('St. Francis' and 'Hamilton') from Sydney, N.S. to Baltimore, Md. for the sum of Eleven Thousand Dollars ($11,000.00) U.S. Funds.
>
> "It is understood that these vessels are now ready at Sydney and that you have arranged to have them placed in seaworthy condition with all watertight doors closed and rudders secured amidships.
>
> "It is further understood that these two vessels will be taken as a double tow, that is the two vessels in tow of the one tug. It is further understood and agreed that our services will be supplied in accordance with the Standard Towing Conditions attached hereto and forming part hereof.
>
> * * * * * *
>
> "We shall also be entitled to engage an American towing company to supply tug service for part of the voyage in American waters and the services of any tug so supplied shall be considered as supplied under

[4] Owners of WINDING GULF sued the tug and owners in the Southern District of New York which resulted in a decision of both at fault and a decree dividing damages. *Adams v. The Peter Moran*, 94 F. Supp. 730.

the above mentioned terms and conditions. We or our sub-contractors will supply the necessary personnel for handling the vessels through the Cape Cod Canal.

* * * * * *

"Your acceptance of this letter will constitute a contract between us."

The attached Standard Towing Conditions[*] included the following clauses:

* * * * * *

"Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

"The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

"Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug

[*] The letter and Standard Towing Conditions are reproduced in full, Record, pages 21-24.

Company or the Master, or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

"The foregoing conditions shall apply to any damages, injuries, or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any maneuver for the purpose of making fast to, or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss or damage to the tug or tugs or to property on board the tug or tugs or to damages for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs."

Foundation Maritime Ltd. had arranged with Moran Towing Company to take over the tow at the east end of the Cape Cod Canal to complete the voyage to Baltimore. Petitioner was not a party to this arrangement.

The master of the Foundation Maritime tug, testifying by deposition, identified himself as an employee of Foundation Maritime and said he knew nothing about arrangements between petitioner and Foundation Maritime.[6] He said that he took his tug to Sydney, arriving at 5:10 A.M., on July 3d, 1945, immediately located the destroyers in Sydney harbor, and made fast alongside of them. He found them, as expected, with no crews aboard and without motive power.[7] The tug's crew went aboard the destroyers and

[6] Record, pages 24, 34.
[7] Record, page 26.

placed the tug's own gear aboard them and, under the supervision of the tug master, made other extensive preparations for the voyage.[8] As the destroyers had no electric power, lights were supplied and set in place by the tug, and the master inspected the work and declared himself satisfied that the destroyers were in fit condition to be towed.[9] They were then taken in tow, in tandem on the tug's hawsers, and the flotilla proceeded to the Cape Cod Canal. It was there met by the Tug PETER MORAN, a 1,000 ton diesel electric tug carrying a crew of 15 men. The master of the Moran tug identified himself as an employee of Moran Towing Company and testified, as had the master of the Foundation Maritime tug, that he knew nothing about arrangements between his company and the owner of the destroyers.[10] He found no crews aboard the destroyers, and stated that he had not expected to find any.[11] The PETER MORAN took the destroyers alongside through the canal, and, while traversing the canal, her master boarded and inspected both of them. After passing through, the tow was again made up in tandem, and while being so towed in the vicinity of Hen and Chickens lightship, the I-24 was brought into collision with the WINDING GULF. As noted in the district court's opinion, of the total crew of 15 aboard the PETER MORAN, only the master and a deckhand were on deck at the time of collision.[12]

The district court found that the collision was the result of negligence of both the WINDING GULF and the master of the tug and, by imputing the fault of the master of the tug to the owner of the tow, held petitioner liable on the cross-libel and entered a decree dividing damages

---

[8] Record, pages 26-29.
[9] Record, pages 33, 29.
[10] Record, pages 35, 39-40.
[11] Record, pages 38, 41.
[12] Record, page 5.

The court held that the master of the tug "by the terms of the contract became" the servant of the owners of the tow, that the provisions of the contract thus legally resulted in making his faults directly attributable to the owner of the tow, and that "these faults may be ascertained in this case without the circuity of action due to their first being litigated in a suit by the WINDING GULF against the tug."[13]

Petitioner appealed from the finding of liability on the cross-libel. There was no cross-appeal from the district court's finding of negligence on the part of the WINDING GULF.

In affirming, the court of appeals said the case was "governed" by *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291,[14] but did not specifically approve or disapprove the district court's conclusion that the contract made the tugmaster petitioner's servant. Instead, although the district court had assumed that "no question of indemnity arising under the contract" could be litigated in the case,[15] the court of appeals, after noting that such a contract of indemnity had been "enforced" in a suit against the owner of a tow by the owner of a tug which had been compelled to pay damages to an injured third party,[16] said it saw "no reason why it should not be given effect in a suit by an injured third party against the owner of the tow * * *"[17]

---

[13] Record, page 13.
[14] Record, page 61.
[15] Record, page 13.
[16] Referring solely to *Moran Towing and Transportation Company v. Navigazione Libera Triestine, S.A.*, 92 F. 2d 37, 1937 A.M.C. 981.
[17] Record, page 63.

SUMMARY OF ARGUMENT

Dismissal of the cross-libel is required by *Sturgis v. Boyer*,[18] in which this Court held that an inert tow, wholly under the direction and control of the master and crew of a towing vessel, is no more responsible to third persons for the consequences of collision brought about by the fault of the master of the tug "than so much freight."

The applicability of the rule of *Sturgis v. Boyer* is not affected by the "standard towing conditions" in the contract between the owner of the tug and the owner of the tow; because,

(a) as an attempt by a tower of an unmanned vessel to stipulate against liability for his own negligence, the standard towing conditions are invalid; and

(b) whether valid or not, (1) the provision therein declaring that the master and crew of the tug are the agents and servants of the owner of the tow is not conclusive on the factual question of agency of the master of the tug so as to give to a third person a direct right of action against the owner of the tow; and such provision is not sufficient to overcome all other circumstances of this case establishing that at the time of collision, the master and crew of the tug were, in fact, the agents and servants of the towing company; and (2) the agreement to indemnify the towing company cannot be directly enforced against petitioner by respondents here, who were strangers to it.

---

[18] 24 How. (65 U.S.) 110.

ARGUMENT

A. The Standard Towing Conditions are invalid as an attempt by a tower of an unmanned vessel to stipulate against liability for his own negligence.[19]

This court in 1860 carefully considered the liabilities of towed vessels to third persons in *Sturgis v. Boyer*,[20] and there held

> "* * * whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; * * *"[21]

Application of this principle would have permitted full recovery by petitioner and required dismissal of the cross-

---

[19] This proposition is persuasively presented in brief for petitioners in the companion case to this, *The Bisso No. 3 — William A. Bisso, Jr., Receiver, et al. v. Inland Waterways Corporation*, No. 50, October Term, 1954, now pending in this Court. A decision in favor of petitioners therein would seem necessarily to require reversal of the decisions below in this case.

[20] 24 How. (65 U.S.) 110; See also *The Eugene F. Moran*, 212 U.S. 466 (1909); and *Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals*, 251 U.S. 48 (1919).

[21] 24 How. (65 U.S.) 110, 122.

libel in this case.[22 & 23] And, as the contract was invalid, it was not effective to prevent its application.

In 1870 in *The Syracuse*[24] when a tow libelled a towing vessel for damage sustained when brought into collision with a third vessel, the owner of the tow-boat defended on the basis of a contract provision reciting that the towage was at the risk of master and owners of the tow. This Court said that "the policy of the law" requires the exercise of reasonable care, caution and maritime skill on the part of those engaged in the management of the towing boat, and if disaster occurs as a result of the neglect of these, "the towing boat must be visited with the consequences;" that "* * * if it be true, * * * that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss;"[25] and that towers "must see that the large amount of property intrusted to their care is not placed in jeopardy, through the want of preliminary caution and foresight on the part of the officers of their steamers."[26]

Since *The Syracuse* decision, lower admiralty courts generally seem to have considered it settled that a tug could not by contract exonerate itself from liability for its own

---

[22] Court of Appeals for the Fourth Circuit decision herein, Record p. 61; *Robins Drydock & Repair Co. v. Navigazione Libera Triestina, S.A.*, and *Moran Towing & Transportation Company, Inc.*, (Brenta II), 154 N.Y. Misc. 788, 1931 A.M.C. 1741, aff'd. 261 N.Y. 455, 1933 A.M.C. 700 cert. den. 290 U.S. 656.

[23] Robinson, *Handbook of Admiralty Law* (1939), p. 679, etc.; Griffin on *Collision* (1949), Par. 245, p. 559.

[24] 12 Wall. (79 U.S.) 167.

[25] 12 Wall. (79 U.S.) 167, 171. This language does not seem to be open to an interpretation that the court refused to give effect to the release clause because it was insufficiently specific. The court seems to have been willing to assume that the agreement could have been couched in language of the utmost clarity without changing the result.

[26] 12 Wall. (79 U.S.) 167, 173. A policy intended to insure preliminary caution and foresight on the part of those in control of the towboat is particularly appropriate in towage of "dead" ships.

negligence.[27] Although the Second Circuit in 1909 decided in favor of the validity of such a release,[28] this court denied certiorari,[29] and later, in 1920, affirmed[30] *Mylroie v. B. C. Mills Tug and Barge Company*, in which the Ninth Circuit had held a tug "* * * not allowed by law to avoid by contract the consequences of its own negligence."[31] Again in 1928, *Compania de Navegacion v. Firemen's Fund Insurance Co.*, (The Wash Gray),[32] this Court took occasion to confirm the doctrine of *The Syracuse*. There, an insurer defended suit by the owner of a towed vessel on the ground that under the provisions of its policy the insurer was discharged by reason of a release to the towing vessel and assumption of risk by the towed vessel contained in the towage contract. The provisions of the contract were held not to release the tug from liability for the negligence of its master and crew, and it was said that "the rule laid down by this court in *The Syracuse* covers the point."[33]

---

[27] *Alaska Commercial Co. v. Williams*, 128 F. 362, 366 (C.A. 9, 1904); *The Jonty Jenks*, 54 Fed. 1021 (N.D. N.Y., 1893); *In Re Moran*, 120 Fed. 556 (E.D. N.Y., 1903); *The Somers N. Smith*, 120 Fed. 569 (D.C. Me., 1903); *The Sea Lion*, 12 Fed. 2d 124, 1926 A.M.C. 265; and see Griffin on *Collision*, p. 463.

[28] *The Occanica*, 170 F. 893 (C.A. 2, 1909). The majority recognized that its decision was a "departure from previous decisions". Judge Coxe dissented, stating: "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it."

[29] 215 U.S. 599.

[30] 259 U.S. 1. Although this Court found it unnecessary to consider whether the exemption clause was void, the Sixth Circuit, in *Great Lakes Towing Co. v. American S.S. Co.*, 165 F. 2d 368, as recently as 1948, regarded the affirmance as "in effect if not in phrasing" applying the doctrine of *The Syracuse*, and as a precedent which probably would require the invalidating of a contract provision declaring the master and crew of the tug to be the servants and agents of the owners of the tow.

[31] 268 F. 449.

[32] 277 U.S. 66.

[33] 277 U.S. 66, 73.

Nothing in this Court's subsequent decision in *Sun Oil Company v. Dalzell Towing Company*[34] makes the doctrine of *The Syracuse* inapplicable to the towage of a "dead" ship. There, this Court affirmed the Second Circuit,[35] which had enforced a clause declaring the master and crew of the tug to be the agents and servants of the owners of tow, in a case where the tow was damaged through the negligence of one of the tugmaster's who was on board acting as docking pilot. Observing that the tanker's "master, officers and crew were at their stations and her propelling power and steering apparatus were used," this Court said "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power.[36] Noting that the services covered by the contract were "less than towage",[37] it was then said that the provision was nothing more than an expression of the well-established rule that "when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former * * *"[38]

The *Sun Oil Company* decision is not a far-reaching one. It was not intended to and did not overrule *The Syracuse*, and does not impair the force of that decision as an expression of policy applicable to a towage situation, particularly of a "dead" vessel. The broad validating of all towage contracts in all situations was wholly unnecessary to the results. The decision does not rest exclusively, or even prin-

[34] 287 U.S. 291.
[35] 55 Fed. 2d 63. The court of appeals laid great emphasis upon the difference between pilotage and "dead" towage.
[36] 287 U.S. 291, 293.
[37] 287 U.S. 291, 294.
[38] 287 U.S. 291, 295.

cipally, on the language of the contract. To the contrary, it rests principally on an application of the doctrine of "loaned servant" to a situation so peculiarly appropriate that the result should have been the same without the contract.[39]

Since the *Sun Oil* decision, *The Syracuse* and *The Wash Gray* have continued to be interpreted and applied as prohibiting a tug from contracting against its own negligence,[40] and where the effect of *Sun Oil* has been discussed, the tendency has been to strictly limit it to situations where the tow is under power, and her master and crew are on board and actually in control.

For example, in 1948 the Sixth Circuit held the *Sun Oil* case inapplicable where the master of the tug was not upon the assisted ship, having indicated that, if necessary to its decision, it would on authority of *The Syracuse* hold invalid the provision declaring the master and crew of the tug to be the agents and servants of the tow;[41] the Southern District of New York held in 1949 that, except in the "special case" presented in the *Sun Oil Company* situation, the *Wash Gray* still requires "a general release or exemption running to the tower" to be held void;[42] and the District Court, for the District of Delaware, in 1953, concluded that

---

[39] See point B of this brief comparing *Sturgis v. Boyer*, supra, in which, it is submitted, the presence of a contract declaring master and crew of the tug the agents and servants of the owner of the tow, even if valid, would not have altered the result.

[40] Professor Robinson, writing after the *Sun Oil* case, says that as a result of the *Wash Gray* decision, "* * * it seems to be settled that the contract exempting the tug from its negligence is not valid." Robinson, *Handbook of Admiralty Law* (1939), p. 672; See 28 Cornell L.Q. 194, 195 (1943), in which it is commented that "If it be intimated that *Sun Oil Company v. Dalzell Towing Company, Inc.*, may have modified the other two cases (*The Syracuse* and *The Wash Gray*), it is submitted, however, that the last case stands alone on its peculiar facts." And see also *Hall Scott Motor Car Company v. Universal Insurance Company*, 122 F. 2d 531 (C.A. 9, 1941); cert. den. 314 U.S. 680.

[41] *Great Lakes Towing Company v. American Steamship Company*, 165 F. 2d 368, cert. den. 333 U.S. 881. See also *Great Lakes Towing Company v. Bethlehem Transportation Company*, 65 F. 2d 543. (C.A. 6, 1933).

[42] *Petterson Lighterage Company v. Tug J. R. Russell*, 87 F. Supp. 467, 470.

past differences of opinion as to the effect of attempts to insulate against liability "were settled in the *Wash Gray*."[43]

By its emphasis in the *Sun Oil* case on the presence of elements of direction and control, this Court clearly indicated its intention to leave undisturbed the rule of *Sturgis v. Boyer* as applicable to towage of unmanned vessels. That intention is confirmed by the careful maintenance of the distinction between towage of unmanned and manned vessels in *Stevens v. The White City*[44] and by the fact that the rule that towage is not common carriage has its source in cases dealing with towage of manned vessels.[45] Unless the policy announced in *The Syracuse* is to be taken as wholly without meaning, situations of towage of dead vessels, such as this, must remain subject to its operation.

B. The Contract Containing the Standard Towing Conditions, Whether or not Valid as Between the Parties, is not Effective to Alter Liabilities of the Owners of Either the Tug or the Tow to Third Parties.

1. *The Contract as Making the Tugmaster Petitioner's Agent as to Third Parties.*

In *Sturgis v. Boyer* it was argued that, because the tug was merely providing motive power and her master and crew were subject to and obeyed the orders of the master and other officers of the tow, who were aboard their vessel, the fault of the master and crew of the tug was imputable to the tow. This Court however said it made no difference whether all or a part of the officers and crew of the tow

---

[43] *Texas Company v. Lea River Lines, Inc.*, 109 F. Supp. 266, 267, reversed on other grounds 206 F. 2d 55 (C.A. 3, 1953).

[44] 285 U.S. 195, 200 (1932).

[45] *The Webb*, 14 Wall (81 U.S.) 406 (1871); *The Margaret*, 94 U.S. 494 (1876). The rule did not deter this Court in *The Syracuse* from proscribing a tug's exoneration from liability for its own negligence. See brief of petitioner in *Bisso No. 9, et al. v. Inland Waterways Corporation*, No. 50, this term, page 13, n. 26.

were aboard, "provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and *from the nature of the undertaking, and the usual course of conducting it*, the master and crew of the tow were not expected to participate in the navigation of the vessel."[46] (Italics supplied.) After fully examining the nature of the undertaking, (noting particularly that the owners of the tow did not appoint the master or crew of the tug and could not displace them), the Court concluded that under all the evidence the tugmaster continued the agent of the owners of the tug, who alone remained responsible for his actions in her navigation.[47] Summarizing, the Court said:

> "* * * it clearly appears in this case that those in charge of the steam tug had the *exclusive control, direction and management of both vessels*, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the services for which she was employed, or that anyone belonging to the ship either participated in the negligence, or was guilty of any degree of negligence whatever in the premises."[48]

This Court in *Sun Oil Company v. Dalzell Towing Company*, applied the standard of direction and control, just as it did in *Sturgis v. Boyer*, and the language of the towing contract was treated as only one of a number of elements entering into its decision. In reaching its conclusion, this Court obviously felt called upon to first satisfy itself that from the nature of the entire undertaking and the usual course of conducting it, the master and crew of the tow not only participated in the navigation of the tow, but controlled and directed the entire operation.

---

[46] 24 How. (65 U.S.) 110, 122-123.
[47] Ibid. 125.
[48] Ibid. 125.

No court other than the district court in this case has ever extended the *Sun Oil* decision to impart conclusive effect to a declaration in the towage contract that the master and crew of the tug are the agents and servants of the owner of the tow so as to permit direct recovery by a third person against the owner of the tow.[49] To the contrary, although that provision has not been frequently invoked as a basis for direct liability of the owner of the tow to third parties, respected admiralty judges and commentators are in complete agreement that agency for this purpose can only be established by the same standards of direction and control applied, just as in *Sturgis v. Boyer*, to *all* the facts in the case, and the *Sun Oil* decision is not deemed to require a departure.[50]

In *Robins Drydock & Repair Co. v. Navigazione Libera Triestina S. A. and Moran Towing & Transportation Company, Inc.*[51] the *Brenta II* was being assisted in undocking by two Moran tugs and, while the master of one of them was aboard directing the maneuvers of the tugs, the ship struck and damaged a dock. The dock owner sued both the tugs and the steamer. Negligence of the tugmaster who boarded the steamer, one Healey, was established, but the tug owner contended that Healey was, as a matter of law, the agent of the ship and not the agent of the towing company by reason of the pilotage clause. The trial court said:

---

[49] Unless the opinion of the Court of Appeals herein can be said to approve this as a basis for decision.

[50] "The liabilities to third persons of the shipowner or of the towing company depend, or may depend, upon whose servant the pilot is. If the pilot's general employer attempts to transfer his services by contract to the shipowner as a special employer for a particular job, the question is whether he thereby becomes the latter's servant as against third persons (see expressions of Supreme Court in *Sun Oil Co. v. Dalzell*, 287 U.S. at 295, 1933 A.M.C. at 37, 38). Certainly it is doubtful whether the special employer would, for instance, have the right to discharge the pilot." Griffin on *Collision* (1949), Par. 197, p. 465.

[51] 154 N.Y. Misc. 788, (1931) aff'd 261 N.Y. 455, (1933) cert. den. 290 U.S. 656.

"* * * as to persons not parties thereto the liability of the defendants must be measured by the actual relation of each of the defendants to Healey at the moment of the accident. That relation must be determined by all the facts surrounding Healey's employment. It is by no means conclusively established by what the parties in the 'pilotage clause' declared those relations to be, * * * The language of the parties could not have been made strong enough to change the essential character of the relation by any change of name. It must be implied from all the surrounding circumstances, even though these may be contradictory or disputed. * * *"

"Tested by these principles, I am of the opinion that as to the plaintiff, Healey, notwithstanding the 'pilotage clause' remained the servant of the towing company. The Columbus Marine Corporation, the agents of the owner of the BRENTA II, engaged the towing company not only to provide tugs suitable for the particular work to be done, but to provide a pilot also. The towing company was informed that the vessel to be 'undocked' was under steam. No suggestion was made to the towing company as to the manner in which the 'undocking' should be carried out or whether or not the ship's own power should be used. When the tugs arrived Healey, who was in charge of the operation for the towing company, immediately boarded the steamer, went to the bridge and assumed command of the situation by directing the movements of the tugs as well as those of the ship. The master and crew of the BRENTA II in executing Healey's orders were mere instrumentalities used by Healey to apply the wheel, the engine and the other instruments of navigation, which in conjunction with the tugs were used to undock the vessel. Control and direction and the choice of methods rested exclusively with Healey as the representative of the towing company. The conduct of all the parties thus rather plainly shows that there was at least a tacit understanding that the Moran Company was engaged to render a general service in

undocking the steamer and was not merely to provide tugs to assist the BRENTA II in the undocking operation. The towing company must therefore be considered an independent contractor in this venture, and since Healey was employed in carrying out its business it is liable to third persons for his negligence."[52]

On appeal Judge Crouch of the Court of Appeals of New York said that under the general rule as announced in *Sturgis v. Boyer*, the tower acts as an independent contractor and is primarily liable for negligent injuries, and, except for whatever effect may be afforded the "pilotage clause", that rule would apply. But, the court said:

> "* * * as such, it has no validity as to third persons. * * * something more, however, is claimed for it. Because it says that the 'tugboat captain becomes the servant of the owners * * * in respect to the handling of such vessel', it is argued that such was in fact Healey's relation to the ship's owner, even when considered in the light of the surrounding facts and circumstances. We do not understand appellant to argue that in and of itself the clause was conclusive on plaintiff. That, of course, would not be so. * * * The question became one of fact and was so determined below; nor did the court in considering the question, lose sight of the contract itself, as appellant asserts. The description which the parties gave to their own relation was weighed against the facts, and the facts were found not to justify that description. We think the finding was right."[53]

Although the Second Circuit subsequently allowed recovery over by the tug owner against the owner of the *Brenta II* on an indemnity feature of the contract, that decision contains nothing which can be construed as less than complete approval of Judge Crouch's opinion, which was

---

[52] 154 N.Y. Misc. 788, 794, 795.
[53] 261 N.Y. 455, 462, 463.

characterized as that "of a most accurate and distinguished judge".[54] Subsequently Judge Clark of the Second Circuit took occasion to point out that the authority of the State Court decision in *Brenta II* "* * * is not impugned by" the outcome of the later litigation in the Federal Courts between the parties to the contract.[55] And the Eastern District of Pennsylvania, in holding that a pilotage clause makes the issue of loaned servant none the less a factual issue, said "we need cite only one case in support of the conclusion we have reached" viz, the Second Circuit decision in *Moran Towing & Transportation Company v. Navigazione Libera Triestina, S. A.* Thus, that court reads the Second Circuit decision as adopting the view of the New York Court of Appeals and as an affirmative holding that a pilotage clause will not relieve the towing company where it will not "set off other circumstances showing that the pilot was tug's servant * * *"[56]

In *Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company* (William J. Worth)[57] both tug and tow were sued by owners of a dock damaged by the steamer through negligence of a tug master directing undocking operations from aboard the steamer. The Third Circuit (having in earlier proceedings[58] vacated a decree entered by the District Court of the Eastern District of Pennsylvania against the vessel owner) affirmed the district court's decree imposing sole liability on the tugs. The Court, citing *Sturgis v. Boyer* and the *Brenta II*, said:

> "* * * in this case the court was justified by the evidence in finding, as it did, that Captain Marvel of the

[54] *Moran Towing & Transportation Co. v. Navigazione Libera Triestina*, 92 Fed. 2d 37 (1937).
[55] Dissenting in *Logue Stevedoring Co. v. Tug Dalzellance, etc.*, 198 F. 2d 369 (CA 2, 1952).
[56] *Winters, Martin, etc. v. Tug H. C. Jefferson*, 69 F. Supp. 650, 651 (1946).
[57] 171 F. 2d 48 (1949).
[58] 165 F. 2d 1002

NEPTUNE directed the undocking operation, giving all the orders involved except for the original casting off of the WORTH, and that he and not Captain Ryder of the WORTH was in general charge of the undocking operation. It thus appears that Captain Marvel was not loaned by the Tugboat Neptune Company to the WORTH and did not come under authority of Captain Ryder of that vessel or become its employee for the time. On the contrary, it is settled that under the circumstances present here the relation of the two tugboat companies to the WORTH and its owner was that of independent contractors". And

"* * * while it was proper for the court to consider the pilotage clause in determining the actual fact as to whether Captain Marvel was in control of the undocking operation or was acting under the orders of Captain Ryder, the clause was not conclusive upon that point and it was, therefore, not error for the Court from the other evidence in the case to find the actual fact to be that Captain Marvel acted throughout as employee and agent of the tugboat companies."[59]

In *Patterson Oil, Inc. v. Tug Port Covington*, wherein libelant's mooring dolphin was damaged as a result of the negligence of both tug and tow, and both were sued, the District Court for the Eastern District of Pennsylvania declined to consider the effect of the pilotage clause which the tug owner contended made the vessel owner solely liable, again stating "the pilotage clause by which the docking pilot became the servant of the vessel and her owners does not affect the tort liabilities of the parties to the libelant, whatever its effect may be as between the two parties to the contract."[60] The court of appeals, affirming, said "* * * the district court refused and properly so, to adjudi-

---

[59] 171 F. 2d 48, 50, 51.
[60] 109 F. Supp. 953, 955.

cate with reference to questions related to the operation of pilotage clause."[61]

In *Logue Stevedoring Company v. Dalzellance, etc.*,[62] the steamer Alston was brought into collision with derricks through negligent handling of the ship by the master of one of the assisting tugs, who was aboard the steamer acting as docking pilot. In a suit by the derricks against the tugs and the tow *in rem*, the majority of the Second Circuit held the Alston liable.[63] Judge Clark, dissenting, said "the authorities do not permit a decree against * * * the owner of the Alston. He criticized the majority decision as an unjustified departure from *Sturgis v. Boyer* and applauded the decisions of the Third Circuit in *William J. Worth* and of the New York Court of Appeals in *Brenta II* as giving proper effect to *Sturgis v. Boyer*. The *William J. Worth*, he said "is the more important since it overrode * * * counter-arguments * * * based on a 'pilotage clause' for indemnity under the contract * * *" The *Brenta II*, he said "states clearly and enforces the principle of the towing concern as the independent contractor."[64]

In the absence of any precedent to the contrary, such substantial authorities as *William J. Worth* and *Brenta II* cannot be lightly discarded. They are not fairly distinguishable as deciding only that the tug cannot shield itself from liability by asserting the pilotage clause. In any case in which all three parties are before the court, the pilotage clause is as much a weapon for imposing liability on the

---

[61] 205 F. 2d 694, 699.

[62] 198 F. 2d 369 (C.A. 2, 1952).

[63] On *in rem* principles as the offending vessel, on authority of *The Helen*, 5 R. 2d 54, without relying on the contract, but to the contrary questioning its relevancy. The District Court had treated the contract as justifying its conclusion that the towing company was an independent contractor, thus affirmatively employing it as a basis for exonerating the tow.

[64] 198 F. 2d 369, 374.

tow as it is a shield for the tug against third parties. The *Brenta II* and *William J. Worth* took proper cognizance of that fact, resting as they do on *Sturgis v. Boyer* which squarely involved the question of liability of the owner of the tow to third parties. They announced a principle requiring holding the tug and exonerating the tow in spite of the contract, and although the Fourth Circuit disclaimed any intention to adjudicate the right of the tug to escape liability, its reasoning would necessarily have resulted in exonerating the tug, had it been in the case.

In spite of any language in the contract, the record herein makes it abundantly clear that "from the nature of the undertaking and the usual course of conducting it," petitioner was not expected to participate in the navigation of this flotilla. Through representatives who were landsmen knowing nothing about the navigation of vessels, petitioner engaged a reliable and established towing concern to perform a specialized job in whatever manner seemed best to it. Both tugs were seaworthy vessels, properly manned and equipped. Both towing companies knew in advance that the destroyers would have no motive power or steering apparatus. It was expressly stipulated that they would "supply the necessary personnel" for handling the vessels, and the Peter Moran in fact carried a crew of 15, only two of whom were on deck at the time of collision. It is not suggested that petitioner would have opposed the stationing of part of this crew on the destroyers, which the tugmaster had ample opportunity to do. The agreement with respect to the intermediate tower contemplated that petitioner was to have no choice in this, and there is no evidence that petitioner even knew who the intermediate tower would be. Neither tugmaster knew anything about the arrangements between their respective towing

companies and petitioner. Both affirmatively testified that they were employees of their respective towing companies, and they reported directly to the offices of those companies. Petitioner did not appoint them, and nothing could be more obvious than that petitioner had no right to discharge them. The Master of Foundation Maritime tug assumed command of the situation from the moment he located the destroyers.[65] He did not find any representative of petitioner on board and had not expected to find any. Neither he nor the master of the Peter Moran asked for any advice from petitioner as to what lights to display, what length of hawsers to use or whether to man the tows. The nature of the undertaking afforded them no opportunity to consult at any time with any representative of the petitioner.

Opposing this is only the bare language of the pilotage clause, and "there is no magic power residing in the words of that stipulation to transmute the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact."[66]

2. *Direct Enforcement of the Contract Against Petitioner as Indemnitor.*

The decision of the court of appeals directly enforcing the contract in favor of a third party against the petitioner as indemnitor is wholly without precedent in the admiralty law.

Sturgis v. Boyer leaves little room for doubt that there can be no direct liability except by application of the doc-

[65] Capt. Dykeman, Master of the Foundation Maritime tug, arrived in Sydney, and took charge of the destroyers at 5:10 A.M. on July 3rd, 1945 (Record p. 261). The letter from Foundation Maritime to Petitioner, containing the standard towing conditions, was dated at Halifax, N.S., July 3rd, 1945. In *The Syracuse*, this Court said "it seemed that the canal boat had been made fast, the tow put in motion and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed."

[66] *Commercial Insurance Co. v. Ives*, 46 Ill. 402.

trine of *respondeat superior*. There, this Court said "* * * whether the party charged ought to be held liable is made to depend in all cases of this description upon his relation to the wrong-doer." and "* * * liability ceases where the relation (of principal and agent) ceases to exist * * *".[67] Again, the Court said "No such consequences (of liability) follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel."[68]

This should have been sufficient to dispose of all other theories as to petitioner's liability to the WINDING GULF, leaving the only feature of the contract bearing any possible relevancy that declaring the master and crew of the tug to be the agents and servants of the owner of the tow. But the Fourth Circuit, in its apparent reluctance to agree with the district court that the contract as a matter of law made the tugmaster petitioner's agent, adopted on its own initiative the indemnity theory of liability. No such argument was made by cross-libelants, who to the contrary, repeatedly disclaimed any intention to rely on the contract *qua* contract, and the district court assumed "that any question of indemnity arising under the contract could not have been litigated here in this case."[69]

Moran Towing & Transportation Company v. Navigazione Libera Triestina, S.A.,[70] does not justify the action of the

---

[67] 24 How. (65 U.S.) 110, 124.
[68] *Ibid.* 124.
[69] Record, page 13.
[70] 92 F. 2d 37 (C.A. 2, 1937), cert. den. 302 U.S. 744.

Fourth Circuit. There the Second Circuit held that the New York Court of Appeals in deciding the *Brenta II* properly did not adjudicate any rights of indemnity under the contract, because, even though both parties were before the State court as co-defendants, in the absence of an application for cross-relief, no such determination could have been made.[71] The Moran case actually emphasizes the error of the Fourth Circuit, and, in fact, was cited by the Southern District of New York in 1951 as authority for stating that a libel by a damaged third party against both tugs and tow "cannot determine" any question as to the tug's right to indemnity against the owner of the tow under the pilotage agreement.[72]

The Fourth Circuit has placed itself in irreconcilable conflict with well-established principles of the law of contracts limiting the right of third persons to enforce obligations under contracts to which they are not parties.

This Court in *Robins Drydock and Repair Company v. Flint*[73] refused to permit recovery by time charterers of a steamship against a drydock company for loss of use of the steamer delayed in drydock because damaged while there through the negligence of drydock employees, the libel having been brought upon the apparent theory that the contract for drydocking between the drydock company and the owners was made for the charterer's benefit and was incidental to the charter party. Justice Holmes said:

> "* * * it is plain, as stated by the circuit court of appeals, that the libelants, respondents here, were not parties to that contract 'or in any respect beneficiaries', and were not entitled to sue for a breach of it 'even

[71] 92 Fed. 2d 37, 40.

[72] *Logue Stevedoring Company v. Tug Dalzellance, etc.*, 98 F. Supp. 276 (D.C. S.D. N.Y., 1951), reversed on other grounds, 198 F. 2d 369 (C.A. 2, 1952).

[73] 275 U.S. 303.

> under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. 2d 4. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit.' *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 57 L. ed. 195, 199, 42 L.R.A. (N.S.) 1000, 33 Sup. Ct. Rep 32 * * * the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third parties as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else."[74]

Similarly, in *Isbrandtsen Company v. Local 1291 of International Longshoreman's Association*[75] the Third Circuit denied the right of time charterers of a vessel to sue a longshoremen's union for damages caused by delay in unloading, due to a work stoppage contrary to the provisions of a contract between the union and a marine trade association. The court held that the charterer (not a party to the contract) was neither a "donee" nor a "creditor" beneficiary but, at best, only an "incidental" beneficiary, and said: "We think that *Robins Drydock & Repair Company v. Flint* shows clearly that there could be no recovery under federal authority * * *"[76]

In *In re Gubelman*, it was said:

> "The rule that may be formulated under the federal decisions permits a third person not a party to a contract to enforce the promisor's obligation only where he is the beneficiary solely interested in the promise,

[74] 275 U.S. 303, 307-308.
[75] 204 F. 2d 495 (1953).
[76] The court employed the classification of beneficiaries as used in Restatement of Contracts, pp. 133-147.

and in such case it must appear that the parties intended to recognize the third person as a primary party in interest."[77]

Respondents question the applicability of this principle because the claim on the cross-libel here is for a maritime tort, and does not involve a third party contractual situation.[78] We entirely agree that the principle has no place in the case, but it cannot fairly be said that the *Robins* and *Isbrandtsen* cases are not germane to the treatment of the matter by the Fourth District.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals affirming petitioner's liability on the cross-libel be reversed, and the cause remanded to the district court with instructions to dismiss the cross-libel and enter decree for petitioner.

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. FEINBLATT,
Proctors for Petitioner.

---

[77] 13 F. 2d 730, 731 (CA 2, 1926). See also, *Central States Grain Co-op. v. Nashville W. & E. Corp.*, 48 F. 2d 138 (C.C.A. 7th, 1931).

[78] Respondent's brief in opposition to Petition for certiorari, p. 12.